

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

**UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit**

No. 19,769

232

GREENWOOD AND MAJESTIC CONSTRUCTION CO.,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

**Appeal From The United States District Court
For The District Of Columbia**

**United States Court of Appeals
for the District of Columbia Circuit**

FILED MAR 1 1966

Nathan J. Paulson
CLERK

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COUNTER-STATEMENT OF QUESTION PRESENTED

In the opinion of appellee, the question is:

Where under a government construction contract a dispute arises respecting the validity of a liquidated damage clause, must not the contractor, as a condition to judicial relief, comply with the provision of the contract requiring that all disputes arising under the contract be presented to an administrative tribunal for resolution?

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<u>Because appellant failed to pursue</u> <u>the administrative remedy provided</u> <u>by the contract, the court below</u> <u>properly refused judicial relief</u>	2
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*Cases and authority chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLEE

SUMMARY OF THE ARGUMENT

Appellant's failure to abide by the express terms of its contract, requiring all disputes arising under the contract be first submitted to an administrative tribunal for resolution, barred its action for judicial relief. Merely because the dispute concerned the legality of a particular clause of the contract and was, hence,

a question of law, did not relieve appellant from its obligation to exhaust the prescribed administrative remedy. Although administrative determinations on questions of law are not conclusive on the parties, they, nevertheless, frequently serve a useful purpose in eliminating needless litigation, and must be sought.

ARGUMENT

Because appellant failed to pursue the administrative remedy provided by the contract, the court below properly refused judicial relief.

Appellant, in its brief, expressly concedes that it did not complete, within the time prescribed, its segment of the Potomac Interceptor Sewer required by the contract. Under the circumstances, the District of Columbia properly invoked the special condition of the contract which provides, in part, "[t]he Contractor shall pay to the District of Columbia as fixed, agreed, and liquidated damages, the sum of \$250 for each calendar day of delay in completion of the contract * * *" (J. A. 11).

Appellant's sole contention is that the clause of the contract providing for liquidated damages constitutes a penalty and, hence, is unenforceable, because, according to appellant, this clause

does not relate to damages, but was inserted in the contract to "serve only as an added spur to performance." Appellant bottoms this argument on the allegation of its complaint that the construction of other segments of the sewer, both above and below the segment for which it was responsible, was not contemplated by the District to be completed prior to the date that appellant actually completed its segment. Consequently, appellant reasons, the District was not, and could not have anticipated that it would be, damaged by appellant's delay in the completion of the contract.

Whether this allegation is supportable, or whether the District may have anticipated and, in fact, incurred other damages as a result of appellant's delay, such as the expense of retaining, during the period of delay, outside consultants and inspectors on the job as well as other administrative overhead, is immaterial, because under Article 15 of the contract, such disputes must first be submitted to an administrative body for resolution. Article 15 of the contract provides, in pertinent part, that:

" * * * all disputes concerning questions arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Contract Appeals Board * * *"
(Emphasis supplied; J. A. 12).

In its brief, appellant concedes that it did not appeal to the Contract Appeals Board the decision of the contracting officer invoking the liquidated damages clause of the contract. In an attempt to justify its failure to pursue the prescribed administrative remedy, appellant argues that the dispute involves a question of law, and that the Contract Appeals Board is without authority to resolve any such question.

But the mere fact that the dispute between the parties involves a question of law does not relieve the contractor from its contractual obligation to first submit the matter to the Contract Appeals Board. Prior to the Wunderlich Act (Act of May 11, 1954, c. 199, § 2, 68 Stat. 81, 41 U. S. C. 322), decisions of the Contract Appeals Board on disputes over questions of fact and questions of law were final and conclusive upon the parties. United States v. Moorman, et al., 338 U. S. 457 (1950). Following Moorman, the Congress passed the Wunderlich Act, Section 2 of which provides:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."
[Emphasis supplied.]

Although under this statute, as construed by this Court in Kenny Construction Company v. District of Columbia et al., 105 U. S. App. D. C. 8, 262 F. 2d 926 (1959), decisions of the District of Columbia Contract Appeals Board involving questions of law are not final and conclusive on the parties as are its decisions on questions of fact, there is, nevertheless, nothing in such statute to prevent the parties from contracting to have disputes concerning questions of law first submitted to the Contract Appeals Board.

The various United States Contract Appeals Boards, as does the District of Columbia Contract Appeals Board, frequently consider and resolve disputes over questions of law. There is no pretense that such decisions are conclusive on the parties, but the submission of such disputes to the Contract Appeals Board often obviates the necessity of court litigation. The bulk of the cases coming before the District of Columbia Contract Appeals Board involve disputes over the construction of a particular provision of the contract. Such disputes are unquestionably legal, as distinguishable from factual, disputes.

And there is no substance to appellant's argument that an appeal to the Contract Appeals Board would necessarily have been

futile. Although counsel for appellee is unaware of any case coming before the District of Columbia Contract Appeals Board involving the validity of the liquidated damages provision of a contract, such questions have been considered by various United States Contract Appeals Boards. In the case of Standard Coil Products Company, Inc., 59-1 BCA ¹ 9005, the Armed Services Board of Contract Appeals not only considered the question of whether a liquidated damage clause of a contract constituted, under the facts of that case, a penalty, but, in addition, granted the contractor relief from the provisions of the clause. The Board there stated, at page 9009:

"Finally, appellant contends that the part of the liquidated damages clause which provides that the 'minimum amount of liquidated damages of any one day's delay' shall be \$20.00 is a penalty unenforceable as a contract. We have, after much travail, reached the conclusion that this contention must be sustained."

By pursuing the administrative remedy provided by the contract, Standard Coil Products Company, Inc., found it unnecessary to seek judicial relief.

¹Board of Contract Appeals Decisions, published by Commerce Clearing House, Inc.

See also the cases of Truax Machine & Tool Company, 59-2 BCA 10,217; Lee Moulding, 61-1 BCA 15,469, 15,478; and Refer Construction Co., 61-1 BCA 15,765, where the Interior Department's Board of Contract Appeals considered the contention of the contractor that a liquidated damage provision of a contract constituted a penalty.

This case is not of the class of cases, cited by appellant, where additional work not covered by the contract has been required of the contractor. In those cases, nothing in the written contract specifies the manner in which the additional work is to be performed or the manner in which the contractor is to be compensated. Disputes resulting from the performance of such additional work may properly be referred to as being connected with the contract, but they do not arise out of the contract. Consequently, since the jurisdiction of the Contract Appeals Board is restricted to disputes arising out of the contract, the Board is without authority to consider disputes resulting from the performance of additional work not covered by the contract.

The cases cited by appellant are altogether different from the one now under consideration. Appellant is complaining of the validity of a particular clause contained in its contract.

Unquestionably, such a dispute arises out of the contract, and is within the jurisdiction of the Contract Appeals Board.

Irrelevant, also, are the United States Court of Claims cases, relied upon by appellant, where the contractors were permitted to take directly to the court disputes over questions of law. In those cases, the contract specifically provided that all disputes concerning questions of fact arising under the contract shall be submitted to an administrative tribunal. Obviously, since there was no contractual requirement that disputes concerning questions of law be submitted to an administrative tribunal, such a step was unnecessary as a condition to judicial review. Appellant's contract, on the other hand, is not limited to disputes over questions of fact, but requires that all disputes be submitted to the Contract Appeals Board.

Had appellant submitted to the Contract Appeals Board its dispute over the validity of the liquidated damage clause of the contract, and had the Board agreed that the provision did, in fact, constitute a penalty, the Board could have granted it complete relief. In that event, the Board would not, as suggested by appellant, be revising the contract or waiving the District's rights under the contract, but would be, as it is required to do, merely

interpreting a particular provision of the contract. On the other hand, had the Board disagreed with appellant's contention, it would not have been foreclosed from seeking judicial relief in the court below. Because appellant failed to follow the administrative remedy which it, by contract, had expressly agreed to do, the court below properly refused to grant the relief which was sought. This result was compelled by the decision of the Supreme Court of the United States in the case of United States v. Blair, 321 U. S. 730, 736 (1944), where it is stated:

" * * * Even if the conduct of the Government superintendent or contracting officer, or their assistants, was so flagrantly unreasonable or so grossly erroneous as to imply bad faith, the appeal provisions of the contract must be exhausted before relief is sought in the courts. * * *"

To the same effect is United States v. Joseph A. Holpuch Co., 328 U. S. 234, 240 (1946), where the Supreme Court stated:

"It follows that when a contractor chooses without due cause to ignore the provisions of Article 15 he destroys his right to sue for damages in the Court of Claims. That court is then obliged to outlaw his claims, whatever may be their equity. To do otherwise is to rewrite the contract."

See also United States v. Cunningham, 75 U. S. App. D. C. 95, 125 F. 2d 28 (1941); East River Construction Corporation v.

District of Columbia, 183 F. Supp. 684 (D.C.D.C., 1960); and
John J. Harte Co. v. United States, 91 F. Supp. 753 (Ct. Cl.
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CONCLUSION

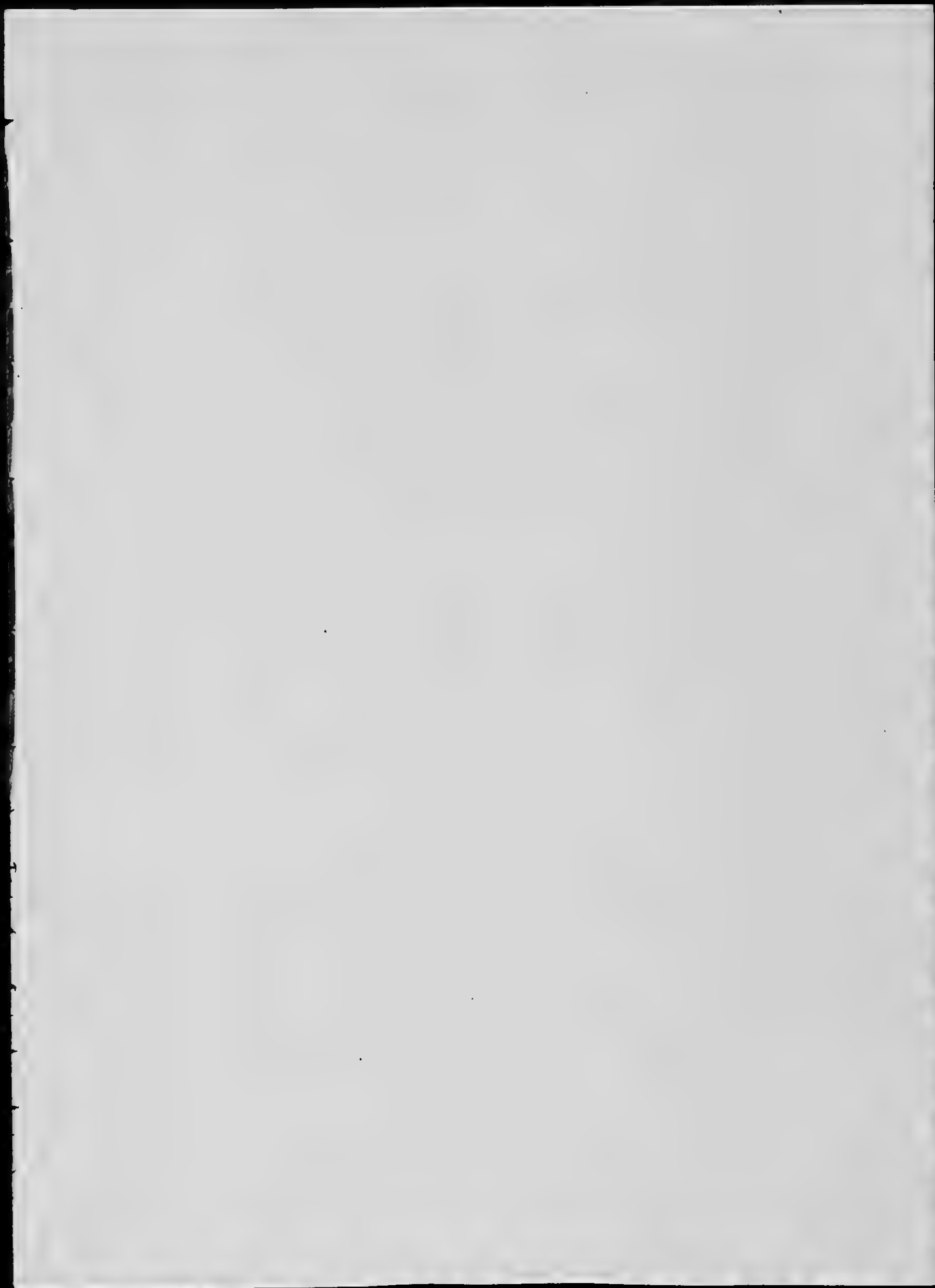
In view of the foregoing, it is respectfully submitted that the
 judgment of the court below was, in all respects, correct and
 should, therefore, be affirmed.

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BRIEF FOR APPELLANT

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for the District of Columbia Circuit

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STATEMENT OF QUESTION PRESENTED

Where under a construction contract the "liquidated damages" assessed against the contractor for delay were in fact and in law a penalty, the principal question presented is whether there were administrative remedies the contractor was required to exhaust prior to bringing suit for breach of contract to recover the portion of the contract price withheld.

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(v)

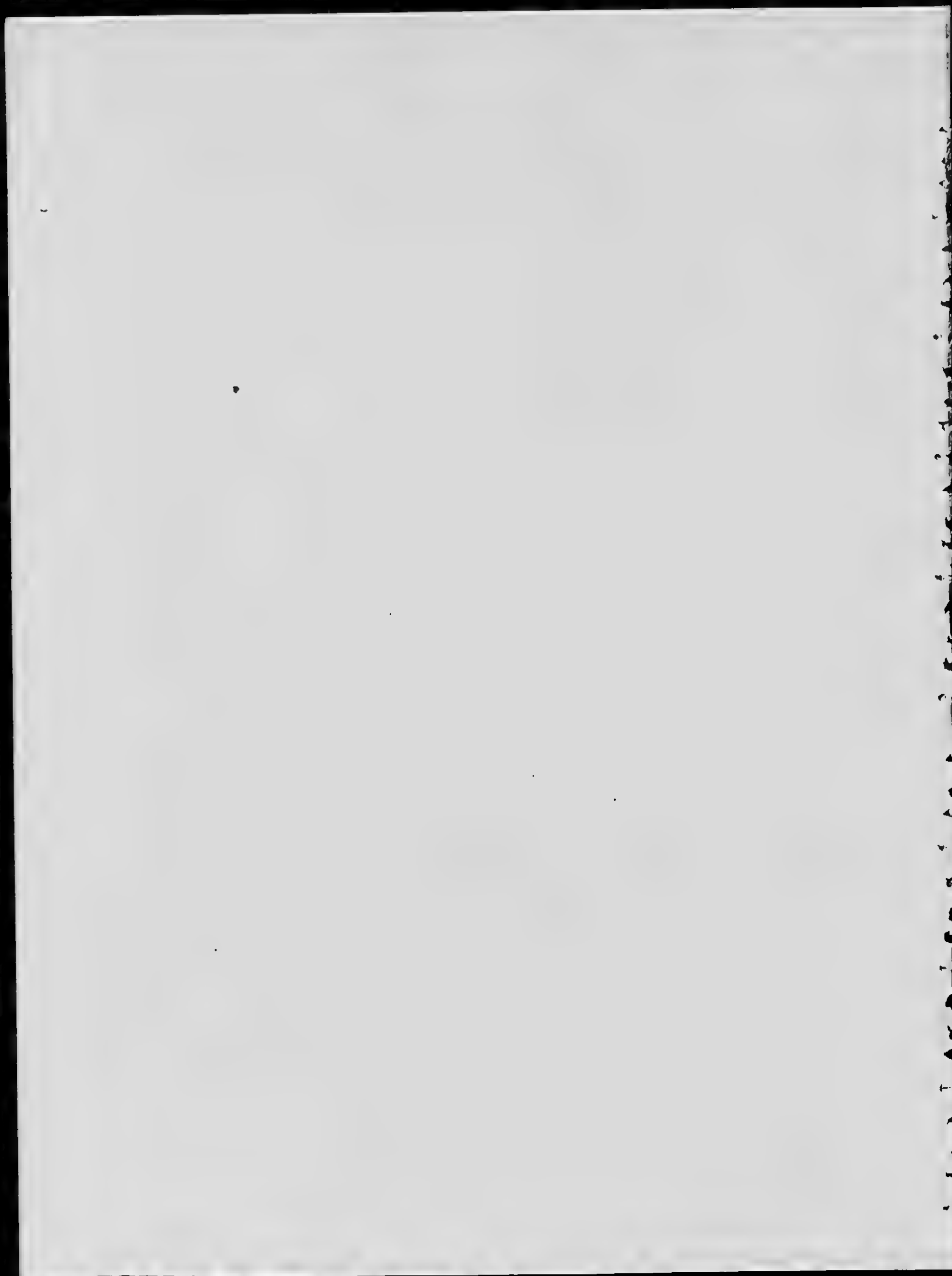
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* Cases or authorities chiefly relied upon are marked by asterisks.



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JURISDICTIONAL STATEMENT

This is an appeal from an order and judgment of the United States District Court for the District of Columbia, entered August 5, 1965, granting summary judgment to appellee against appellant (JA 26). Notice of appeal was filed August 13, 1965 (JA 26). This Court has jurisdiction to review the order and judgment of the district court under 28 U.S.C. 1291. Original jurisdiction of the district court was invoked under D. C. Code, §11-521 (JA 1).

STATEMENT OF THE CASE

The following facts are alleged in the complaint and admitted by appellee in its answer:

On July 12, 1961, appellant and appellee entered into a contract for the construction by appellant of a portion of the Potomac Interceptor Sewer (JA 2, 6).

As planned and built by appellee, that sewer line extends more than 20 miles from Dulles International Airport and from various other points in Loudoun and Fairfax Counties, Virginia, across the Potomac River into Montgomery County, Maryland, and thereafter generally follows the course of the Potomac River to the western boundary of the District of Columbia, at which point it connects with appellee's main sanitary sewer system (JA 2, 6).

The purpose of the Potomac Interceptor Sewer is to intercept and conduct sewage from Dulles International Airport and adjacent areas in Virginia and Maryland into the District of Columbia sewage treatment and disposal facilities (JA 2, 6). To construct it, appellee divided the proposed Potomac Interceptor Sewer into approximately ten lineal segments or units and entered into a separate contract for the construction of each of these units (JA 2, 6). The contract appellee entered into with appellant, No. D.C.F.-C 18959, provided for the construction of one of these units, known as Unit 3, and lying between Angler's Inn and Great Falls, Maryland (JA 2, 6).

Appellant's contract and various change orders issued pursuant thereto called for appellant's completion of Unit 3 by February 27, 1963 (JA 3, 6). The contract contained a provision requiring appellant to pay appellee the sum of \$250, denominated "liquidated damages," for each calendar day of delay in completion of the contract, "subject to the provisions of Article 9 of the Contract Form, Form No. 23"

(JA 2, 6, 11). Article 9 provided for payment of liquidated damages in lieu of actual damages (JA 2, 6, 11-12). Appellant did not complete performance of the contract until July 16, 1963 (JA 3, 6); appellee withheld from the sums due appellant under the contract the sum of \$34,750, as "Liquidated Damages 139 Cal. Days [from February 27 to July 16, 1963] at \$250 per day," (JA 3, 6), for which appellant brought this action.

In its complaint appellant alleged (JA 3) and appellee in its answer admitted (JA 6-7) that the nature of the Potomac Interceptor Sewer and its plan were such that no unit of the Sewer could function as a sewer until all "lower" units, i.e., all units downstream from the unit in question, were first completed, connected, and ready to function; that lying downstream from appellant's Unit 3 are at least two other units of the Potomac Interceptor Sewer; that the contracts for the construction of such other units were not awarded by appellee until after appellant's contract for the construction of Unit 3 was awarded; and that construction of such other units was not in fact completed until after July 16, 1963, the date appellant completed construction of Unit 3.

Appellant further alleged that the completion of Interceptor Sewer units downstream from Unit 3 was not scheduled until some time after completion of Unit 3; that, by reason of the fact that such downstream units were not in fact completed until after Unit 3 was actually completed, appellee had not been damaged by the delay in the completion of Unit 3; and that, in view of the foregoing, appellee's withholding of \$34,750 from the contract price due appellant constituted the imposition of a penalty by appellee on appellant and a breach of contract by appellee (JA 2-4). Although these allegations were denied by appellee in its answer (JA 6-7), on oral argument in the court below counsel for appellee conceded, for the purposes of the motion before the court, that the sum withheld by appellee did constitute a penalty (JA 25).

Appellant, in accordance with Rule 33 of the Federal Rules of Civil Procedure, promptly after filing suit served interrogatories upon ap-

pellee (JA 4-5) to elicit from appellee specific information pertaining to identification of the several units of the Potomac Interceptor Sewer and their location with reference to Unit 3; the completion dates for the several units expected by appellee at the time of entering into the contracts for those units and for Unit 3; and the dates on which the several units were actually completed. Appellee's objections to the interrogatories were overruled by the district court (JA 23-24) "in the event the Court denies defendant's [appellee's] motion to dismiss the complaint or, in the alternative, for summary judgment." In view of this order, the interrogatories were still pending, unanswered, at the time of the lower court's subsequent granting of appellee's motion for summary judgment, as set forth below.

In its answer to the complaint appellee asserted as a defense that appellant had "failed to exhaust his administrative remedies provided for in the alleged contract." (JA 5-6). On this same ground, appellee thereupon filed its motion to dismiss the complaint or, in the alternative, for summary judgment (JA 9). Following oral argument, the court below, on August 5, 1965, entered an order granting appellee's motion for summary judgment (JA 26), from which order and judgment appellant took this appeal (JA 26).

In its motion for summary judgment and accompanying papers appellee showed that appellant had been late in completing contract performance; that appellant had requested an extension of time from the contracting officer to complete the contract; that the contracting officer had granted appellant a 35-day extension of time, leaving appellant 139 days late in completion; and that appellant had failed to appeal from this decision of the contracting officer to the District of Columbia Contract Appeals Board. It was appellee's position that, as appellant had not taken such appeal, it had not exhausted its administrative remedies and the court below lacked jurisdiction over the subject matter.

In the court below it was appellant's position that it was not disputing the contracting officer's refusal to give it further extensions of time — a dispute that would have been appealable to the Contract Appeals Board — but was satisfied with the correctness of the contracting officer's decision in this respect; that there was therefore nothing to appeal; that what appellee did wrong was not appealable at all — the wrong was not one the contracting officer or the Contract Appeals Board could have corrected, in that it consisted of a breach of contract, the withholding from appellant of \$34,750 of the contract price to which appellant was entitled, a breach for which no administrative remedy was or could have been provided in the contract; and that the so-called liquidated damages provision, upon which appellee relies to excuse its breach, was in truth a penalty and therefore unenforceable.

The court below nevertheless held that appellant had "failed to exhaust its administrative remedies as required in" the contract, and granted appellee's motion for summary judgment (JA 26). This appeal followed.

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

Section 2 of the Wunderlich Act, Act of May 11, 1954, c. 199, §2, 68 Stat. 81, 41 U.S.C. 322, provides:

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

Pertinent provisions of the contract between appellant and appellee are set forth in the Joint Appendix, JA 10-12.

STATEMENT OF POINTS

1. The court below erred in granting appellee's motion for summary judgment.

2. The court below erred in entering judgment for appellee.

3. The court below erred in holding that there is no genuine issue as to any material fact.

4. The court below erred in holding that appellant had failed to exhaust its administrative remedies.

5. The court below erred in holding that there were administrative remedies available to appellant to correct appellee's breach of contract.

6. The court below erred in holding that the contract between the parties required the exhaustion of administrative remedies in the circumstances here presented.

7. The court below erred in failing to find that there were genuine issues as to material facts necessary to be litigated.

8. The court below erred in failing to find that the liquidated damages provision in issue constitutes a penalty unenforceable against appellant.

9. The court below erred in failing to find that there were no administrative remedies available to correct the imposition of such a penalty.

10. The court below erred in failing to find that the question at issue between the parties, imposition upon appellant of the liquidated damages penalty, was not a question arising under the contract susceptible of resolution under administrative procedures provided by the contract.

11. The court below erred in granting appellee's motion for summary judgment prior to requiring appellee to answer appellant's interrogatories, which would have enabled appellant to demonstrate the penal character of the so-called liquidated damages provision.

12. The judgment of the court below should be reversed.

SUMMARY OF ARGUMENT

This is an action for recovery by appellant of a penalty, denominated liquidated damages, exacted of appellant by appellee at the conclusion of appellee's performance of a contract. Appellee's defense, and the basis for the summary judgment in favor of appellee granted by the court below, was that appellant had "failed to exhaust its administrative remedies as required" by the contract (JA 26).

For the purposes of its motion for summary judgment, appellee conceded below that the \$34,750 it withheld as "liquidated damages" from the contract price due appellant was truly a penalty (JA 25). That it was a penalty is also clear as a matter of law. As the "liquidated damages" clauses of the contract actually provided for exaction of a penalty, those provisions were invalid and unenforceable.

It follows that there were no administrative remedies that appellant was required to exhaust. Appellee places its reliance on Articles 9 and 15 of the contract. While those articles specify certain administrative procedures, they are inapplicable to appellant's claim. The administrative procedures provided by Article 9 are limited to determinations as to the facts and extent of the contractor's delays and granting extensions of time for completing the work. But there were no disputes between the parties as to these matters. The parties agree that appellant was 139 days late in completing performance. See the Complaint and Answer, JA 3, 6. The parties agree that appellant was entitled to no extensions of time beyond those already granted it. There was no dispute between the parties as to any of these matters, and therefore nothing that Article 9 committed to administrative determination.

The administrative jurisdiction to decide disputes under Article 15 is limited to "questions arising under this contract" and it is well settled that such questions are only those deriving from some contract

2. The court below erred in entering judgment for appellee.

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It follows that there were no administrative remedies that appellant was required to exhaust. Appellee places its reliance on Articles 9 and 15 of the contract. While those articles specify certain administrative procedures, they are inapplicable to appellant's claim. The administrative procedures provided by Article 9 are limited to determinations as to the facts and extent of the contractor's delays and granting extensions of time for completing the work. But there were no disputes between the parties as to these matters. The parties agree that appellant was 139 days late in completing performance. See the Complaint and Answer, JA 3, 6. The parties agree that appellant was entitled to no extensions of time beyond those already granted it. There was no dispute between the parties as to any of these matters, and therefore nothing that Article 9 committed to administrative determination.

The administrative jurisdiction to decide disputes under Article 15 is limited to "questions arising under this contract" and it is well settled that such questions are only those deriving from some contract

provision that expressly authorizes the contracting agency to modify the contract, adjust the price, or give other relief in defined circumstances. There is nothing in the contract authorizing the agency to waive liquidated damages or to determine the legal unenforceability of the "liquidated damages" provisions. The Article 15 administrative remedies are no more pertinent, therefore, than are those of Article 9.

Moreover, the penal nature of the "liquidated damages" exacted from appellant presents a question of law, which is not committed to administrative determination and which, indeed, in view of section 2 of the Wunderlich Act, *supra*, could not be.

It follows that there was no administrative remedy for appellant to exhaust, and the judgment below should be reversed.

ARGUMENT

I

The Liquidated Damages Provision of the Contract Was a Penal Provision and Unenforceable

Appellant completed construction of Unit 3 of the Potomac Interceptor Sewer 139 days late, in terms of the completion date called for by the contract and the extensions of time for completion granted by the contracting officer. Appellee accordingly, in paying for the work, subtracted from the contract price and withheld from appellant the sum of \$34,750. This appellee denominated liquidated damages. In the circumstances of this case, however, it is clear that the liquidated damages provisions of the contract (JA 11-12) were actually provisions for payment of a penalty and were therefore invalid and unenforceable. In essence, therefore, appellee failed to pay the agreed contract price for the work done by appellant. For this simple breach of contract, appellant brought this action — to recover the \$34,750 rightfully due it.

It is well settled that a liquidated damages provision in a contract will be enforced only "If under the circumstances and expectations of the parties existing at the time of execution it appears that the provision is a reasonable protection against uncertain future litigation" (*Davy v. Crawford*, 79 U.S. App. D.C. 375, 376, 147 F.2d 574, 575); that "Liquidated damages in an amount that has no bearing and no relation to the actual damages suffered, and in an amount that is conceivably larger than any actual damages that are likely to be sustained, may be deemed to be a penalty and a penalty is not enforceable" (*Woodner v. Sankin*, 188 F.Supp. 259, 260 (D.C.D.C.), aff'd _____ App. D.C. _____, 289 F.2d 873; that

"In order to determine whether or not [a] provision should be construed as a penalty [and therefore void] the contract must be construed as a whole as of the date of its execution. * * * [D]amages stipulated in advance should not be more than those which at the time of the execution of the contract can be reasonably expected from its future breach, and agreement to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced" (see *Davy v. Crawford*, *supra*, 79 U.S. App. D.C. at 376, 147 F.2d at 575, and cases there cited);

and that courts will not "give their imprimatur" to liquidated damages arrangements which do not relate to damages at all but "serve only as an added spur to performance" (*Priebe & Sons v. United States*, 332 U.S. 407, 413, 92 L. ed. 32, 39). See also *United States v. J. C. Martin Lumber Company*, 246 F.2d 58, 61-62 (C.A. 5); *National Coop Refinery Ass'n. v. Northern Ordnance*, 238 F.2d 803, 805 (C.A. 10); *Massman Const. Co. v. City Council of Greenville, Miss.*, 147 F.2d 925 (C.A. 5); *Restatement of the Law, Contracts*, §339; and, for the latest expression by the Congress on this subject, contained in the Uniform Commercial Code as adopted for the District of Columbia, Act of Dec. 30, 1963, 77 Stat. 669, D.C. Code, §28:2-718(1).

The facts alleged in the complaint (JA 2-3) show that by the foregoing tests the liquidated damages provisions in the instant contract were actually a penalty and therefore not enforceable as a matter of law. Appellee's admissions contained in its answer (JA 6-7) further support this view.

The simple facts are (alleged in the Complaint (JA 3) and admitted by appellee (JA 6-7)) that the unit of the Potomac Interceptor Sewer built by appellant (Unit 3) was not usable as a sewer until at least two other units of the Interceptor, downstream from Unit 3, were completed; that contracts for the construction of such downstream units were not awarded by appellee until after appellant's contract was awarded; and that such downstream units were not in fact completed until after appellant actually completed Unit 3. In these circumstances appellee cannot possibly have suffered any damages due to appellant's late completion.

By assessing \$34,750 "liquidated damages" against appellant for late completion despite the fact that, because other units of the Interceptor were still incomplete, Unit 3 stood totally idle and unusable as a sewer for months after appellant had completed performance, appellee has acted much like the City of Greenville, Mississippi, in the *Massman* case, *supra*. There the parties had contracted for the construction of piers to support a bridge across the Mississippi River and the contractor was charged "liquidated damages" for failure to complete on time. As stated by the Fifth Circuit Court of Appeals,

"However, the entire bridge was finished at least 30 days before it could be utilized on account of the lack of a road leading to it from the Arkansas side of the river. 'All dressed up and nowhere to go,' the bridge sat unutilized for 30 days or more after its full completion, so that the delay by [plaintiff] did not cause a delay in beginning the operation of the toll bridge * * *. However, the City, demanding its pound of flesh, insists

upon the right to have \$250 per day as liquidated damages under its contract * * *." (147 F.2d at 926).

In *Priebe & Sons, supra*, where the Government received actual delivery of its eggs on time and therefore suffered no damage, the Supreme Court refused to countenance the assessment of "liquidated damages" because of the contractor's failure to meet a pre-delivery inspection schedule. In the instant case, as in *Priebe & Sons*, the "liquidated damages" provisions could "serve only as an added spur to performance. It is well-settled contract law that courts do not give their imprimatur to such arrangements." 332 U.S. at 413, 92 L. ed. at 39.

To demonstrate conclusively that the circumstances at the time of the execution of the contract compel the conclusion that, as a matter of law, the liquidated damages provision constituted a penalty, appellant, shortly after filing the complaint, served interrogatories upon the appellee (JA 4-5). Appellee's objections thereto (JA 7-8), although qualifiedly overruled (JA 24), were in essence still pending, and the interrogatories unanswered, at the time the court below granted appellee's motion for summary judgment. In this, in and of itself, the court below erred; at the very least it was inappropriate to grant appellee's motion for summary judgment prior to giving appellant full opportunity to develop the circumstances to demonstrate that it was a penalty, and not liquidated damages, that appellee had exacted from appellant. Cf. Rule 56(e), Federal Rules of Civil Procedure, and the Notes of the Advisory Committee on Rules regarding the 1963 amendment thereto.

All this aside, however, appellee's concession in the court below settled conclusively, for the purposes of appellee's motion, and for the purposes of this appeal from the court's ruling on that motion, that it was a penalty, and not liquidated damages, that appellee had exacted from appellant (JA 25).

It follows that appellee breached its contract with appellant when appellee did not pay appellant the full contract price to which it was entitled, but withheld from that price an exaction illegal by the rules laid down by this Court and the other authorities cited above.

But appellee apparently takes the position that although the amount withheld from appellant was a penalty, and therefore an illegal exaction, appellant may not recover from appellee because appellant did not exhaust its administrative remedies.

II

There Were No Administrative Remedies for Appellant To Exhaust

Appellee defended the case below and seeks to sustain the judgment below on the ground that appellant failed to exhaust its administrative remedies. The simple fact is, however, that the alleged administrative remedies were non-existent. The administrative remedies on which appellee relies are contained in Articles 9 and 15 of the contract (JA 11-12). We shall demonstrate their inapplicability to appellant's claim.

A. The administrative remedies provided by Articles 9 and 15 are inapplicable because the one is limited to the facts and extent of delay and extensions of time for completing the work and the other is limited to questions arising under the contract.

Article 9 of the contract deals with a contractor's delays and appellee's rights with respect to such delays. It provides, first, that appellee may terminate the contract in the event of contractor's delays. It then provides, if appellee does not terminate, for the payment of liquidated damages, as set forth in other contract papers (JA 11), in lieu of actual damages. Finally, Article 9 provides that liquidated damages shall not be charged if the contracting officer, after due notice given by the contractor, finds that the delays were due to unforeseeable causes

beyond the control and without the fault or negligence of the contractor and extends

"the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty (30) days, by the contractor to the Contract Appeals Board, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto." (Emphasis supplied)
(JA 12)

These contract provisions relied upon by appellee have nothing to do with this case. Appellant did not claim below, nor is it claiming here that the contracting officer was wrong in denying it further extensions of time. Appellant was quite convinced, by the contracting officer's findings as to the facts and the extent of the delays, that it was entitled to no further extensions, and we accept his findings and decision in these respects as correct. This being so, there was nothing for appellant to appeal and appellant was not obligated, by any contractual provision or otherwise, to go to the Contract Appeals Board. Appellant, in brief, has not sought to use the courts rather than the Contract Appeals Board to review the contracting officer's failure to grant appellant further extensions of time.

There having been no appealable question and no requirement, contractual or otherwise, that appellant appeal to the Contract Appeals Board, appellant's failure to do so cannot bar it from bringing this action to recover the \$34,750 of "liquidated damages" withheld by appellee from the contract price due appellant. For it is the essence of appellant's case that appellant is entitled to recover the \$34,750 not because appellant's delays were justified within the meaning of Article 9, which they were not, and not because appellant was entitled to further extensions of time, which it was not, and not because the con-

tracting officer, in not granting appellant further extensions, erred, which he did not, but because, even though appellant's delays were not justified within the meaning of Article 9 and even though it was not entitled to further extensions of time and even though the contracting officer did not err, exaction of the liquidated damages payment constituted as a matter of law, in the circumstances of this case, and as appellee conceded in the court below, the exaction of a penalty, which, under the law, appellant is entitled to recover.

Just as there was no applicable administrative remedy under Article 9, so the Article 15 disputes procedure afforded none. The disputes jurisdiction of Article 15 extends solely to "questions arising under this contract." (JA 12). Disputed questions "arising under" the contract are only those where some contract provision expressly authorizes the contracting agency to grant an adjustment in price or other specific relief in defined circumstances. For example, Article 3 of the contract authorizes the contracting officer to change the drawings or specifications of the contract within the general scope thereof and to make an equitable adjustment in price or in time required for performance accordingly. Article 3 then provides that if the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Article 15. Likewise, Article 4 authorizes similar adjustments in contract price or performance time in the event of discovery of "changed conditions." Similar administrative authority to modify the contract in specified circumstances is found elsewhere in the contract, e.g., in Article 6.

The questions posed by the nature of the equitable adjustment or contract modification to be made as authorized by such provisions of the contract are all "questions arising under" the contract. But the question in this case is not of that sort. Nowhere in the contract has there been committed to the contracting officer or Contract Appeals Board the authority to modify the contract to eliminate therefrom the

liquidated damages provision or to determine that it is unenforceable. That provision is a part of the contract and, absent any authority given them to modify it or determine its unenforceability, such as is found in Articles 3 or 4, they must administer the contract as written. The effect of such administration was to pay appellant less, by the amount of the "liquidated damages" penalty exacted, than appellant was entitled to under the contract and the law. To obtain relief from this, no administrative remedy is provided by the contract — the question is one connected with the contract, as is any claim for breach of contract, but not one arising under it, which is the only kind of claim the contracting officer and the Contract Appeals Board are given authority to pass upon. And, as stated by Judge Davis of the United States Court of Claims:

"Exhaustion of the administrative remedy has not been required * * * where the facts relate to a type of claim, such as for a breach, which the contract does not commit to agency determination. Those disputes are connected with, but do not arise under, the contract." *Utah Construction and Mining Company v. United States*, 339 F.2d 606, 616 (Ct. Cl.),¹ cert. granted November 8, 1965, 15 L.ed.2d 155.

The law is well summarized in Bragdon, *Administrative Resolution of Delay Claims in Government Contracts*, 14 Admin. L.Rev. 8, 10 (1961), as follows:

¹ We have cited this case as well as a number of other Court of Claims decisions in view of that court's expertise in the area of government contracts, recognized by this Court in *Brister & Koester Lumber Corp. v. United States*, 88 U.S. App. D.C. 197, 188 F.2d 986, 988:

"We are inclined to follow * * * a rule of law established by that court [Court of Claims] in respect to a Government contract."

The instant contract is a standard United States Government form of contract, slightly modified for use by appellee District of Columbia.

"Contract claims are considered as falling into two categories, one being 'claims arising under the contract' and the other being 'Claims for breach of contract.' As to 'claims arising under the contract' the executive departments assume the jurisdiction to administratively settle them; as to 'claims for breach of contract' the prevailing view is that the executive departments lack the jurisdiction to grant relief. * * * Apparently this distinction is based upon the provisions actually included in the contract. If the contract contains specific provisions authorizing action by the contracting officer and requiring or justifying payment to the contractor of an equitable adjustment for increased costs incurred as a result of government action, then such payment is said to be 'under the contract.' If there is no such contract provision, the claim is generally considered to be one for damages for breach of contract."

Here there was no such contract provision, as all the contract permitted (Article 9) was the contracting officer or the Contract Appeals Board to extend the time for appellant's performance, and it only permitted this if appellant's delays were due to unforeseeable causes beyond the control and without the fault or negligence of appellant. An extension of time granted in these circumstances would have resulted in the "liquidated damages" provision not coming into play. But there was no authority in the contracting officer or the Contract Appeals Board to remit the "liquidated damages" as such. The administrative remedies contained in the contract were therefore inapplicable and non-existent so far as concerned appellant's claim. It follows that appellant's claim — for recovery of the penal "liquidated damages" unlawfully exacted from it — must be considered to be one for damages for breach of contract and beyond the scope of administrative decision.

B. The penal nature of the "liquidated damages" exacted from appellant presents a question of law involving contract interpretation not committed to administrative determination.

The issue posed by appellant's claim for recovery of the liquidated damages assessed against it — whether the liquidated damages provision is truly a penal provision and therefore must be read out of the contract — calls for an interpretation of the contract and constitutes, of course, a question of law. *Kenny Construction Company v. District of Columbia*, 105 U.S. App. D.C. 8, 262 F.2d 926; *Kayfield Construction Corp. v. United States*, 278 F.2d 217, 218 (C.A. 2); *United States v. LeRoy Dyal Co.*, 186 F.2d 460 (C.A. 3); *Pottsville Casting & Machine Shops v. United States*, 121 Ct. Cl. 129, 156, 101 F.Supp. 370, 373; *A. J. Paretta Contracting Co., Inc. v. United States*, 109 Ct. Cl. 324, 351-2, cert. den., 333 U.S. 832, 92 L.ed. 1116; *Lundstrom v. United States*, 53 F.Supp. 709, 711 (D.C. Ore.), aff'd, 139 F.2d 792 (C. A. 9); *Hammaker v. Schleigh*, 157 Md. 652, 667, 147 A. 790, 796, 65 A.L.R. 1285, 1294.

As noted above, the scope of administrative decision under Article 9 of the contract is limited to the facts and the extent of delay (JA 12). That article therefore does not even purport to deal with questions of law such as that raised by appellant.

It is only Article 15 of the contract whose language, read outside the context of the law, is broad enough to encompass questions of law. We submit, however, that as a matter of law the language of Article 15 cannot be given this broad reading.

Article 15 provides (JA 12):

"Except as otherwise specifically provided in this contract, all disputes concerning questions arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Contract Appeals Board, whose decision shall be final and conclusive upon the parties thereto * * *."

Although this language in and of itself sounds broad enough to encompass questions of law as well as questions of fact arising under the contract, such a reading would bring the provision into direct conflict with section 2 of the Wunderlich Act (Act of May 11, 1954, c. 199, §2, 68 Stat. 81, 41 U.S.C. 322) and would indeed invalidate Article 15. Section 2 of the Wunderlich Act is a flat congressional mandate that

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

This Court in 1959 held section 2 of the Wunderlich Act applicable to a District of Columbia construction contract containing an Article 15 identical with that here involved. *Kenny Construction Company v. District of Columbia*, 105 U.S. App. D.C. 8, 262 F.2d 926.

In enacting this law, the "Congress undoubtedly used the expression 'question of law' with the meaning that was universally attached to it, that is, that it included a question as to the interpretation of a contract." See *John A. Johnson Contr. Corp. v. United States*, 132 Ct. Cl. 645, 656, 132 F.Supp. 698, 703. That is the sort of question of law that is here involved: construing the contract to determine whether its liquidated damages provisions are true liquidated damages provisions or, rather, provisions for payment of an unenforceable penalty. See *United States v. LeRoy Dyal Co.* and other cases cited *supra*.

As the "final and conclusive" language of Article 15 applies to "all disputes concerning questions arising under this contract," the only valid reading the "all disputes" language can be given, in the light of section 2 of the Wunderlich Act, is to limit it to disputes concerning questions of fact. Could it be considered that, despite the Wunderlich Act, the "all disputes" clause is ambiguous, the ambiguity must be resolved against appellee, the party that drafted the contract. *Garrison v. United States*, 7 Wall. 688, 690, 19 L.ed. 277, 278; *Guyler v. United States*, 161 Ct. Cl. 159, 165-66, 314 F.2d 506, 509.

In any event, it cannot be assumed that appellee, in preparing the contract seven years after passage of the Wunderlich Act and two years after the *Kenny* decision, was seeking to flout the will of the Congress as interpreted by this Court. The contract must be construed in the light of the state of the law at the time it was entered into. Such a construction permits but one reading of the contract — that the disputes that the contract says shall be resolved by the contracting officer or Contract Appeals Board are limited to disputes concerning questions of fact.

As the question of the construction of the liquidated damages provisions of the contract — as to whether they provide for exaction of a penalty, and are therefore unenforceable — is a question of law, it follows that there was no administrative remedy for the appellant to exhaust.

III

The Authorities Appellee Relied on in the Court Below Are Not in Point

The cases appellee relied on in the court below are inapposite. They are basically of two sorts.

One is the line of cases of which *United States v. Blair*, 321 U.S. 730, 88 L.ed. 1039, is probably the leading example. The *Blair* line of cases holds very simply that a government contractor must follow the contractual disputes procedure with respect to "questions arising under" the contract. In *Blair*, the Court found that all the matters that should have been administratively appealed did concern "questions arising under this contract" (321 U.S. at 735, 88 L.ed. at 1043). *Blair* did not deal with questions not arising under the contract, such as that here involved — those which the contract does not commit to administrative determination.

The other cases appellee relied on in the court below are typified by *Plumley v. United States*, 226 U.S. 545, 57 L.ed. 324. In those cases, the contractor sued the Government for damages suffered from Government-caused delays, but failed in his suit for want of having given the Government the prerequisite notice specified by the contract. The Supreme Court in *Plumley* said that this notice was required by the contract "evidently for the purpose of informing the Department, and enabling it, at the time, to remove the cause of the delay" (226 U.S. at 548, 57 L.ed. at 345), thereby possibly lessening the Government's as well as the contractor's damages. For similar decisions by this Court see *United States v. Cunningham*, 75 U.S. App. D.C. 95, 125 F.2d 28, and *Progressive Builders v. District of Columbia*, 103 U.S. App. D.C. 337, 258 F.2d 431, cert. den. 358 U.S. 881 (first cause of action).²

In the instant case, however, appellant is seeking recovery not of delay damages caused by appellee, but of an unlawfully exacted penalty, and there is no provision in the contract for a prerequisite warning notice to appellee. Indeed, such a notice could serve no such salutary purpose as the contractually-required notices in the *Plumley* line of cases.

None of these cases relied on below by appellee supports appellee's position here, where the contract did not commit the issue between the parties to administrative determination and where, indeed, the contract could not have done so because of the prohibition contained in the Wunderlich Act.

² The *Progressive Builders* second cause of action was a *Blair*-type case, described *supra*, and was passed upon by this Court in accordance with the *Blair* case. As stated in the brief filed in *Progressive Builders* on behalf of the District of Columbia (at p. 14): "Contractor's claim * * * is a claim provided for by the contract itself," e.g., the "changes" provision. Hence, the disputes arose under the contract and were subject to the administrative procedures provided by the disputes clause.

CONCLUSION

For the foregoing reasons, the court below erred in granting appellee's motion for summary judgment, and the judgment below should be reversed.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,769

GREENWOOD AND MAJESTIC CONSTRUCTION CO.,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

APPEAL FROM ORDER AND JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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*House Rept. No. 1380, 83rd Cong., 2d Sess., U.S. Code Cong. & Ad. News 1954, 83rd Cong., 2d Sess., pp. 2191, 2195	4

* Cases and authorities chiefly relied upon are marked by asterisks.

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REPLY BRIEF FOR APPELLANT

ARGUMENT

As this litigation now stands, appellee has conceded:

(1) The so-called liquidated damages assessed against appellant were in truth a penalty (conceded in the court below (JA 25) and not disputed by appellee in its brief filed herein).

(2) The question as to the legality or validity of the "liquidated damages" provision of the contract is a question of law as to which the Contract Appeals Board could not have made a final and conclusive decision (Appellee Br., pp. 1-2, 4-5).

Despite these concessions, appellee continues to argue that appellant was required, before bringing this action, to submit that question of law to the Contract Appeals Board for its non-binding, inconclusive determination.

We submit that this not only was not required by the parties' contract, but also was prohibited by law.

Article 15, upon which appellee now places its whole reliance¹, provides (JA 12):

"Except as otherwise specifically provided in this contract, all disputes concerning questions arising under² this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Contract Appeals Board, whose decision shall be final and conclusive upon the parties thereto * * *."

As a matter of plain English, this says that the only disputes that are subject to appeal to the Contract Appeals Board are those where that Board has the power to issue a final and conclusive decision.

This necessarily excludes the instant question as to the legality of the "liquidated damages" provisions of the contract because, as appellee concedes, that presents a question of law, and section 2 of the Wun-

¹ From appellee's brief it is clear that appellee has abandoned any reliance upon Article 9 of the contract, discussed in appellant's main brief, pp. 12-14, 16.

² We shall not here reiterate the argument covered in our main brief, pp. 14-16, that the matter at issue here is not a "question arising under" the contract.

derlich Act (Act of May 11, 1954, c. 199, § 2, 68 Stat. 81, 41 U.S.C. 322) unequivocally says that

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

See *Kenny Construction Company v. District of Columbia*, 105 U.S. App. D.C. 8, 262 F.2d 926, holding this provision applicable to District of Columbia construction contracts.

Appellee says (Br., p. 5) that "there is, nevertheless, nothing in [the Wunderlich Act] to prevent the parties from contracting to have disputes concerning questions of law first submitted to the Contract Appeals Board." Without our so conceding, the important thing is that these parties did not so contract. The contract requires the appeal of only those disputes as to which the Contract Appeals Board can issue a final and conclusive decision; the Congress has prohibited contractual provisions making final a Board decision on a question of law; hence the contract cannot be construed as an agreement to submit disputes concerning questions of law to the Board.

Moreover, there is a most compelling reason why the parties, even had they so desired, could not have contracted to have their disputes concerning questions of law first submitted to the Contract Appeals Board. The Wunderlich Act prohibits such a contract if it makes final the Board's decision on a question of law. The charter of the District of Columbia Contract Appeals Board provides:

"The decision of the Contract Appeals Board in every case shall be final * * *."

(Reorganization Order No. 29 of the Board of Commissioners of the District of Columbia, Part VII(b), 1 D.C. Code (1961 ed.) Administration, Appendix, pp. 95-96; 1 D.C. Code (1961 ed., Supp. V) Administration, Appendix, p. 16.)

The jurisdiction of the Contract Appeals Board is thus limited to contractual appeals where the Board is legally empowered to make final decisions. Since under the Wunderlich Act no contract can empower the Board to make a final decision on a question of law, it follows that there is no way in which the parties can contract to take such a question of law to the Board.

Nor may appellee take refuge in the fact that Article 15 of the contract refers to "all disputes" rather than, as is frequently the case in the standard form Government contract, "all disputes concerning questions of fact." See, for example, *Pottsville Casting & Machine Shops v. United States*, 121 Ct. Cl. 129, 132. In view of (1) section 2 of the Wunderlich Act, (2) the decision of this Court in *Kenny Construction Company, supra*, and (3) the provision in the Contract Appeals Board's charter limiting its jurisdiction to those appeals in which its decisions can have finality, the "all disputes" clause in Article 15 must be read to mean "all disputes concerning questions of fact." Either that or Article 15 is a nullity.

Indeed, the legislative history of the Wunderlich Act shows that the Committees on the Judiciary were very plain in expressing their intention as to the impact of the legislation on the so-called all-disputes clause:

"Under section 2 of the bill, the committee intends not only to prohibit the insertion in a Government contract of a provision making final a decision of a contracting officer on a question of law, but also bans the indirect insertion of such a provision by incorporation by reference. This will prevent the use of what is commonly known as 'the all disputes clause,' whereby finality of decision was given as to questions of both law and fact."

(House Rept. No. 1380, 83rd Cong., 2d Sess., U.S. Code Cong. & Ad. News 1954, 83rd Cong., 2d Sess., pp. 2191, 2195.)

We do not believe that appellee inserted an all-disputes clause in Article 15 of appellant's contract in an attempt to flout the clearly expressed will of the Congress and thus evade the Wunderlich Act. But if we are wrong in this, it is of course the will of the Congress that must prevail, and, to be given meaning at all, the clause must be read as relating solely to questions of fact. That being so, the question in this case as to the legality or validity of the liquidated damages provisions was not one that was or that could have been committed to administrative determination.

Appellee has cited a decision by the Armed Services Board of Contract Appeals and three by the Interior Department's Board of Contract Appeals indicating that those boards have considered contractors' contentions that liquidated damages provisions constituted penalties. But such decisions are wholly inapposite and immaterial to the issue presented in this case. First, it must be recognized that these are merely decisions of Boards of Contract Appeals, necessarily (because of section 2 of the Wunderlich Act) not final or conclusive, and fairly low on the scale of persuasion. Second, for all that appears these may be instances of nothing more than a combination of (a) voluntary or even mistaken submissions of the disputes by the contractors in the hope of getting some relief and (b) the gratuitous assumption of jurisdiction by the boards, with the knowledge of all concerned that the boards could not render final decisions in any event. Finally, none of these decisions holds, says, or even suggests that the contractor was required to take the appeal to the board. And that is the only issue here. Not whether, had appellant sought to go to the Contract Appeals Board, it might have entertained appellant's claim, and we submit it could not properly have done so. The only issue here is whether the contract required appellant to take to the Board a dispute involving solely a legal question. We have demonstrated that the contract imposed no such requirement.

This being so, the cases cited by appellee at pages 9 and 10 of its brief are likewise not in point. *United States v. Blair*, 321 U.S. 730, 88

L.ed. 1039, *United States v. Holpuch*, 328 U.S. 234, 90 L.ed. 1192, and *John J. Harte Co. v. United States*, 117 Ct. Cl. 309, 91 F. Supp. 753, merely hold, as noted in our main brief, pp. 19-20, that a government contractor must follow the disputes procedure specified in the contract with respect to questions arising under the contract. In the instant case, we repeat, there was no disputes procedure that appellant was required to follow. To the extent that the all-disputes clause in *Blair, Holpuch*, and *John J. Harte* required the contractors there involved to follow the disputes procedures with respect to questions of law as well as of fact, it must be recognized that those were pre-Wunderlich Act cases and, of course, pre-Wunderlich Act contracts. As indicated in our main brief, p. 20, *United States v. Cunningham*, 75 U.S. App. D.C. 95, 125 F.2d 38, cited by appellee, was not a disputes-clause case, but a case where a contractor failed in his damage suit against the Government for Government-caused delays because he had not given the prerequisite written notice specified by the contract. And *East River Construction Corp. v. District of Columbia*, 183 F. Supp. 684 (D.C. D.C.), also cited by appellee, is merely a case where a contractor failed to follow or allege that it had followed contractually provided administrative procedures. Neither *Cunningham* nor *East River* supports appellee's argument.

CONCLUSION

In sum, this is a case where appellee, the District of Columbia, has under the guise of "liquidated damages" exacted a legally unenforceable penalty from appellant. The District nevertheless seeks to enforce it on a theory that finds no support either in the contract of the parties or in the law.

The court below erred in granting appellee's motion for summary judgment. The judgment should be reversed.

Respectfully submitted,

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